No. 9544

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. W. BROOKS, CARL M. DONALDSON, BYRON ECHOLS, B. J. GALE, G. LYNN HATCH, RACHEL JENSEN, MILTON N. JENSEN, R. T. JOHNS, WILLARD E. JONES, JOHN B. JONES, PARLEY P. JONES, T. V. JONES, P. L. LUNT, FENLEY F. MERRILL, ORSON A. MERRILL, HANS MORTENSEN, LESLIE B. PAYNE, ORSON J. RICHENS, HENRY L. SMITH, FLORENCE R. SWOFFORD, MARY JANE JONES, ANNA H. LUNT, NANCY O. PACE, JUNIUS E. PAYNE, J. E. PAYNE, Trustee of the Church of Jesus Christ of Latter Day Saints, E. C. PAYNE, RALPH RICHARDSON, R. RICHENS, NANCY A. SMITH, E. THYGERSON, and B. Y. WHIPPLE, *Appellants,*

vs.

UNITED STATES OF AMERICA and C. A. FIRTH, *Appellees.*

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellants,

vs.

United States of America and C. A. Firth,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an appeal from a final judgment of the United States District Court for Arizona, entered on

March 11, 1940 (R. p. 108), adjudging appellants guilty of contempt for violation of a final decree of said court entered June 28, 1935, and an order of said court pursuant to said decree entered December 9, 1935, in a cause pending in said court entitled, "United States of America, plaintiff, v. Gila Valley Irrigation District, et al., defendants", and numbered Globe-Equity No. 59. The jurisdiction of the District Court was invoked by reason of the United States being a party. (Title 28, U. S. C. A., Sec. 41 (1); Amended Complaint, par. 2, R. p. 2.)

The jurisdiction of this court is invoked under Title 28, U. S. C. A., Sec. 225 (a).

STATEMENT OF THE CASE.

Appellants are the owners of lands and water rights acquired under the laws of New Mexico and situated in the Virden Irrigation District, County of Hidalgo, New Mexico, upon the Gila River.

Appellants were found guilty of contempt of court for violation of the consent decree and of a supplemental order of the court entered December 9, 1935. (R. p. 108.)

The original suit in which the contempt proceedings were had was brought by the United States of America in its own behalf and in behalf of the Pima and San Carlos Indians in Arizona. The suit was brought to quiet title to the water rights of the water users on the Gila River in Arizona and New Mexico

as it flows between a line ten miles east of and parallel to the dividing line between Arizona and New Mexico and the confluence of the Salt River and the Gila River in Arizona. (R. p. 23, par. 15.)

A consent decree was entered June 29, 1935, to which the appellants were parties, by which the priorities of the parties to the suit consenting to the decree were determined, and the defendants, including appellants, were enjoined from diverting water from the River except as provided in the decree.

The decree provides that a Water Commissioner should be appointed by the court to carry out and enforce the provisions of the decree and the instructions and orders of the court; that if any proper order of the Water Commissioner made in accordance with the decree is disobeyed, he is authorized to cut off the water from the ditch used by the person disobeying such order, promptly reporting the action taken to the court; also provides that the salary and expenses of the Water Commissioner and the means of securing funds to pay the same shall be fixed by the orders of the court thereafter to be made. (Appendix pars. XII and XIII.)

On December 9, 1935, the court entered its order appointing C. A. Firth, Water Commissioner, fixing his salary and expenses, and providing further that he should be paid by means of an annual assessment of thirteen cents per each acre of land for which a water right was given by the decree; also that the assessment should be collected from the person designated by the decree as the party entitled to divert

water from the Gila River and ordering the Water Commissioner to refuse the delivery of water "to any person entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre". (R. p. 59.)

By the consent decree entered in this cause June 29, 1935, the defendant Sunset Canal Company and other canal and ditch companies were decreed the sole right to divert water from the Gila River for the use of water users in Arizona and New Mexico above the San Carlos Reservoir (Coolidge Dam), including lands of these appellants (Appendix pars. V and VIII), whose rights and priorities were adjudicated by said decree.

PLEADINGS.

On September 1, 1939, Firth, the Water Commissioner, filed his petition in this cause (R. p. 46) against Sunset Canal Company and these appellants and other defendants in said cause alleging:

(a) That this suit was instituted by the United States of America for the purpose of adjudicating and determining the priority rights to the use of the waters of the Gila River.

(b) That on June 29, 1935, a decree was entered in said cause signed by all the parties, including appellants and Sunset Canal Company, which decree adjudicated the rights of the appellants and others to the use of the water of the Gila River and forever enjoined appellants and other defendants from di-

verting water from the Gila River except under such rights as are determined and allowed by such decree.

(c) That the Sunset Canal Company is the owner of the Sunset Canal mentioned in said decree, and appellants claim the right to use water from the Gila River diverted by the Sunset Canal Company through the said canal and that all parties complained of have, for a long time, recognized said decree and operated thereunder.

(d) That on December 9, 1935, pursuant to said decree an order was entered in this cause fixing the amount of assessments to pay costs and expenses of administration of said decree.

(e) That on or about January 1, 1939, Firth made demand on the Sunset Canal Company for the payment of the water assessment for the first half of the year 1939, and that upon refusal to pay the same for the first half of the year 1939, said petitioner cut off the water from the Sunset canal.

(f) That since January 4, 1939, Sunset Canal Company and appellants have diverted and used the waters of the Gila River in violation of said decree and orders.

(g) That on January 4, 1939, at the Town of Virden, New Mexico, Thomas McClure, C. B. Tooley and John Bradford, Jr., claiming to act as officers and by authority of the State of New Mexico, demanded of Firth the surrender of the keys to the headgates and diverting structures of the Sunset Canal in New Mexico; and upon his refusal to sur-

render same, they broke the locks thereon and took possession of the Sunset Canal in New Mexico, and ever since have been in possession of said canal and have diverted and distributed the waters of the Gila River to the water users owning lands and water rights in New Mexico served by said ditch, including the appellants, and further alleged on information and belief that all of said acts were done by said McClure, Tooley and Bradford as agents of the appellants.

Appellants by their return alleged (R. p. 77):

(a) That there was not now and never had been a corporation known as the Sunset Canal Company in New Mexico nor had said corporation ever owned the Sunset Canal or the diverting structures thereon.

(b) That no corporation ever had or claimed the right to appropriate or divert water from the Gila River in New Mexico.

(c) That they were defendants in said cause and had consented to the entry of said consent decree and their lands lie in New Mexico and are irrigated by water of the Gila River by means of the Sunset Canal.

(d) That thirty defendants named in the final decree were either dead before this suit was filed or before said decree was entered, or have since died or sold their lands and water rights.

(e) They denied that they had diverted water from the Gila River during the year 1939, but admitted they had used such waters diverted by and delivered to them by the water master of the Gila

River in New Mexico appointed by the New Mexico State Engineer.

(f) That acts done by Thomas McClure, C. B. Tooley and John Bradford, Jr., as alleged by petitioner, were done by them in their official capacities as State Engineer of New Mexico, Water Master of the Gila River in New Mexico, and member of the State Police, respectively, acting under the orders and at the direction of the Governor of New Mexico, and that on December 21, 1938, the Interstate Stream Commission, a body charged by the statutes of New Mexico with the duty and authorized to protect and conserve the interests of New Mexico in the interstate rivers of that State, adopted a resolution directing the said State Engineer to demand of said C. A. Firth, Water Commissioner, to cease his control of and interference with the diversion, use and distribution of the waters of the Gila River in New Mexico, and upon Firth's refusal to comply with such request, the said State Engineer was directed to present said resolution to the Governor of New Mexico, requesting him to exercise his authority as Chief Executive of New Mexico to direct that such measures be taken by the proper officers of the State to enforce said resolution; that at all times the said State Engineer has administered said waters in a fair and equitable manner.

(g) That said McClure, Tooley or Bradford, were not appellants' agents; that they did not have control over them, but that all of the acts of said officers were done by them in their respective official capacities and under the direction of the Governor of New Mexico.

(h) That it is impossible to enforce said decree for the reason that half of the area of irrigated land having water rights, on said Gila River, described in said decree, is now owned by persons who were not parties to said suit or to this proceeding, and such persons are entitled to water without regard to said decree.

(i) Appellants denied that they had disobeyed any decree or order of the court.

EVIDENCE.

On November 22, 1938, a meeting of the Interstate Stream Commission was held at Santa Fe, New Mexico, at which appeared two of the appellants and three other persons claiming to represent the Lower Gila River water users, seeking relief from the enforcement of the decree of the United States District Court for Arizona which they claimed deprived the New Mexico water users in the Virden area of their water rights to such an extent that it was becoming impossible to carry on farming. The Commission decided to make the necessary investigation of engineering and legal questions in order to decide what course to take to remedy the condition complained of, and directed the State Engineer and the Commission's attorney to make such investigations. (R. p. 224.) The attorney furnished the Commission an opinion relative to the right of the United States District Court for the District of Arizona to control the waters of the Gila River in New Mexico. (R. p. 227.)

Acting on the advice of the State Engineer and its attorney, the Commission on December 21, 1938, directed the State Engineer to request the United States District Court's Water Commission to relinquish control of the waters of the Gila River in New Mexico, and if he refused to do so to apply to the Governor of New Mexico to exercise his power to put the State Engineer in possession of the diversion and distribution of said waters. (R. pp. 220-223.) The State Engineer also wrote a letter to the Honorable Albert M. Sames, United States District Judge for the District of Arizona, inclosing a copy of the Interstate Stream Commission's resolution. (R. p. 238.)

On January 3, 1939, the Governor ordered the Chief of the State Police to cause the said water commissioner to relinquish control of the waters of said river and to put the State Engineer of New Mexico in possession of the facilities for administering the waters of said stream in New Mexico. (R. p. 225.) Thereafter on January 4, 1939, the State Engineer and John Bradford, Jr., met Mr. Firth and his attorney, John Gung'l, Esquire, at Virden, New Mexico, and demanded possession of the headgates and measuring devices on the Sunset Canal in New Mexico and such possession being refused, the State Policeman Bradford took possession thereof and put the State Engineer in charge. (R. pp. 212-218.) The State Engineer appointed C. B. Tooley water master for the Lower Gila District, and later appointed Hugh Pace water master. (R. p. 212.) The latter continued to act as such during 1939. (R. p. 212.)

In his administration of said waters the State Engineer did not recognize priority of Arizona water rights over New Mexico water rights. (R. pp. 214-215.) He instructed the water master to distribute the water as needed and as economically as possible. (R. p. 215.) Neither the United States of America, the State of Arizona, nor any Arizona resident or Arizona corporation has filed an application to appropriate water of the Gila River in the New Mexico State Engineer's office. (R. p. 216.) The owners and water users of half the acreage in New Mexico described in the complaint and in the consent decree and who used water in 1939 were not parties to said consent decree. When the Water Commissioner Firth cut the water off from the defendants he also deprived the owners who are not defendants of water. (R. p. 217.)

Water from the Gila River is supplied to appellants through the Sunset Ditch. (During 1939 Nancy O. Pace and Mary Jane Jones, appellants, did not use any water from the Gila River. (R. p. 183.)

In 1939 Hugh Pace, Water Master, diverted water from the Gila River by means of the Sunset Ditch. There were approximately 2400 acres of filed water rights under the ditch in New Mexico. Pace delivered water to the water users under the ditch in Arizona when he delivered it to New Mexico water users on the written request of Arizona users. He received requests for water from the Sunset Canal Company. The persons requesting water for the Sunset Canal Company were Parley P. Jones, an appellant, and J.

R. Robbe. At their request Pace turned water into the Sunset Ditch. No other appellant made a request for water. Pace diverted the water in 1937 and 1938 under Firth's direction. He was then employed by Sunset Ditch Company. The company had a ditch rider in 1939. Pace was paid by State of New Mexico for his work as water master in 1939. (R. p. 186.)

Subsequent to the forfeiture of the charter of the Sunset Ditch Company, the business of the Sunset Ditch has been carried on by a voluntary committee which was called a Board of Directors and which was selected by the owners of water rights acquired from the State. The committee held no status recognized by the laws of New Mexico nor was there a ditch company which was a legal entity recognized under the laws of New Mexico. They have used the names of the Sunset Ditch Company and the Sunset Canal Company at different times.

The water right owners contribute money in proportion to the irrigated acreage each owns. The committee selects a president and a secretary. In 1939 the committee was composed of Parley P. Jones, R. W. Brooks and Rachel Jensen, appellants, and Hiram Pace who is not an appellant or a party defendant. Jones was selected president and Mrs. Jensen secretary. The committee has been operating in this manner since 1921 when the Sunset Ditch Company was dissolved and were so acting when the suit was brought and the consent decree was entered.

The assessments were paid to Firth by the committee prior to 1939, but have not been paid since, nor has money to pay them been collected from the water users. A few shares of stock in the Sunset Ditch Company have been issued since 1921 to comply with requirements of the Federal Land Bank. (R. pp. 192-202 inc.) None of the appellants diverted water from the Gila River in 1939. The water was diverted by the officers of the State of New Mexico. (R. p. 185.)

No corporation by the name of the Sunset Canal Company has ever been incorporated under the laws of the Territory or State of New Mexico. The Sunset Ditch Company was incorporated under the laws of the Territory of New Mexico February 9, 1903, and was dissolved June 14, 1921. (R. p. 219.) The Sunset Ditch Company was not authorized by its charter to appropriate water for beneficial use, but was granted power to build, operate and control a ditch to be known as "Sunset Company's Ditch" to take water from the Gila River in Grant County (Hidalgo County), Territory of New Mexico, and supply same for purposes of irrigation in Grant County (Hidalgo County), Territory of New Mexico. (R. p. 241.)

Demand was made by the Water Commissioner upon the Sunset Canal Company and appellants, Jones, Brooks, Jensen and Pace, directors, to pay the assessments, but no demand was made by the Commissioner on any other appellant. (R. p. 204.)

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The court made the following findings of fact:

"II.

"That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the Court acquired jurisdiction in this cause, said corporation was doing business under the name of 'Sunset Canal Company' in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name 'Sunset Canal Company', and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names. (R. p. 131.)

"III and IV.

"That Parley P. Jones, R. W. Brooks, Rachael Jensen and Hiram Pace were officers and directors of the Sunset Canal Company during the year 1939. (R. p. 132.)

* * * * * * *

"XI.

"That, in accordance with said order, the Water Commissioner duly notified each party entitled to divert water from the Gila River, including respondent Sunset Canal Company, to pay 13¢ per acre for all lands for which it was entitled to divert; that the Sunset Canal Company collected said sum from all the water users under its system, including each of the respondents herein, and paid said sum to the Water Commissioner for the years 1936, 1937, and 1938. (R. p. 138.)

* * * * * * *

"XV.

"(A) That on or about January 4, 1939, said respondents hereinbefore named, and each of them, wilfully and unlawfully broke, or caused to be broken, the locks on said diverting structures and measuring devices and caused other locks to be placed thereon;

"(B) That the respondent Sunset Canal Company, and its officers and agents, at all times since the 4th day of January, 1939, have failed and refused to provide adequate locking facilities, or accurate measuring or automatic recording devices, for the use of the Water Commissioner, as provided for in the order of this Court; that said respondent has refused to deliver to the Water Commissioner keys to such locks that were placed on the headgates and recording gauges owned by said Sunset Canal Company, and has denied said Water Commissioner access thereto; and

that said respondent has refused and failed, and still continues to refuse and fail, to furnish the Water Commissioner information as to the amount of water diverted from the Gila River, by said respondent and delivered to the lands under its system during the calendar year 1939;

"(C) That said respondents, and each of them, during the year 1939, denied the right of the Water Commissioner to regulate or control the diversion or distribution of the waters of the Gila River into the Sunset Canal in the State of New Mexico; that during the year 1939, the respondent, Sunset Canal Company, without paying therefor as provided by the decree and order of this Court, wilfully and wrongfully diverted water from the Gila River in the State of New Mexico, and carried the same through the Sunset Canal to the lands of respondents owning or operating lands in the State of New Mexico, and that such respondents wilfully and wrongfully used said water in irrigating the respective lands owned or operated by them (R. p. 141)."

The court made the following conclusions of law:

"3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the states of Arizona and New Mexico and within the jurisdiction of this Court; (R. 143)

"4. That by their acts and conduct, the respondents * * * have violated the terms of said decree and

orders of Court made pursuant thereto; that they have held in contempt the decree and the injunction therein contained, the orders and officer of this Court and that judgment should be entered herein finding and adjudging said respondents, and each of them, guilty of contempt. (R. p. 143.)"

JUDGMENT.

Judgment was entered finding the Sunset Canal Company and appellants guilty of contempt and fining them $100.00 each for the benefit of C. A. Firth, Water Commissioner, to pay the extraordinary expenses incurred by him in the prosecution of appellants and for such other expenses as he has or may incur in the administration of the decree. (R. p. 145.)

SPECIFICATIONS OF ERROR.

I. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico, and appellants' motion to dismiss because the suit in which it was entered was an action to quiet title to waters in the State of New Mexico.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. I (R. p. 150).

II. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water

rights in New Mexico and appellants' motion to dismiss because New Mexico is an indispensable party.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. VII, VIII and IX (R. pp. 152-153).

III. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico and appellants' motion to dismiss for the reason that the decree is a nullity as to successors in title to defendants who have died or sold their property since the date of the decree.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIV (R. p. 155).

IV. The court erred in overruling appellants' motion to vacate the decree in so far as it affects water rights in New Mexico and motion to dismiss because said decree and order operate directly upon the Gila River and canals in New Mexico.

Motion to Vacate (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIV (R. p. 155).

V. The court erred in making Finding of Fact No. II (R. p. 131) that the Sunset Ditch Company was a corporation at the time the court acquired jurisdiction in this cause.

Motion to Vacate Decree (R. p. 188); Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XIII (R. p. 154).

VI. The court erred in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service upon them in New Mexico.

Motion to Quash (R. p. 187); Points to be Relied Upon No. XII and XXIII (R. pp. 154, 159).

VII. The court erred in refusing to permit appellants to prove that the waters of the Gila River claimed to be diverted in violation of the court's decree and order would not have benefited any Arizona water users, including plaintiff's wards, if it had not been so diverted.

Tender of Proof (R. pp. 171-174 inc.); Points to be Relied Upon No. XVI and XVII (R. p. 156).

VIII. The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree are now owned and operated by persons who are not parties to this suit.

Tender of Proof (R. pp. 175-176; Points to be Relied Upon No. XXI (R. p. 158).

IX. The court erred in ruling that the burden of proof was upon the appellants to prove that they were not guilty of the charges of contempt made against them.

Appellants' Exception (R. p. 169); Points to be Relied Upon No. XXVII (R. p. 160).

X. The court erred in overruling appellants' motion to dismiss the petition and rule to show cause for the reason that the evidence before the court failed to show that the appellants, or any of them, disobeyed the decree or any order of the court.

Motion to Dismiss (R. p. 205); Points to be Relied Upon No. XXVIII (R. p. 160).

XI. The fine imposed of $100.00 each on the appellants is for a round sum of money not based upon any proved item or items of expense, but intended to cover probable losses and expense and that if imposed by way of indemnity to the petitioner it should not exceed his actual loss incurred by the violation of the injunction, including the expense of the proceedings necessitated in presenting the offense for the judgment of the court, and is not based upon evidence showing the amount of loss and expense, and the sum of $100.00 is necessarily arbitrary, arrived at by conjecture, and that the said fine is punitive and not remedial.

Exceptions to Court's Proposed Judgment (R. pp. 246-247); Points to be Relied Upon No. XXX (R. p. 160).

XII. If failure to pay the thirteen cents per acre constitutes contempt, the only relief the trial court could have granted the petitioner was to imprison the appellants until they had paid said thirteen cents per acre.

Points to be Relied Upon No. XXXI (R. p. 161).

SUMMARY OF ARGUMENT.

Appellants contend that the decree is void as to their water rights situate in New Mexico because (I) the suit in which the decree was entered was an action to quiet title to water rights, (II) because the State of New Mexico is an indispensable party, (III) because the decree attempts to affect the title to water rights in New Mexico of persons who were not parties to this litigation, and (IV) because the decree and the court's order pursuant thereto operate directly upon the Gila River and canals in New Mexico.

Also appellants contend that the court erred in the following particulars: (V) The Court erred in making Finding of Fact No. II (R. p. 131) that the Sunset Ditch Company was a corporation at the time this suit was filed for the reason that the charter of the Sunset Ditch Company had prior to that time been forfeited under the laws of the State of New Mexico; (VI) That the court erred in overruling the motion of Parley P. Jones, R. W. Brooks, and Rachel Jensen to quash process and service of the same upon them in New Mexico; (VII) That the court erred in refusing to permit appellants to prove that the waters of the Gila River claimed to have been diverted and used by appellants in violation of the court's decree and order would not have benefited any Arizona water users, including plaintiff or plaintiff's wards, if it had not been so diverted and used; (VIII) The court erred in refusing to permit appellants to prove that the court's order and decree were physically impossible of enforcement in New Mexico because one-half of the water rights adjudicated by said decree

are now owned and operated by persons who are not parties to this suit; (IX) The court erred in ruling that the burden was on appellants to prove they were not guilty of contempt; (X) That the evidence failed to show that the appellants were guilty of disobedience or resistance to any lawful writ, process, decree or command of the court; (XI) That the fine imposed upon appellants was not supported by proof of items of loss or damage; (XII) That the appellants were found guilty of a refusal to pay the acreage assessment and that, therefore, the only relief the court could have granted petitioner was to imprison appellants until they shall pay the assessments.

ARGUMENT.

I.

THE DECREE IS VOID IN SO FAR AS IT AFFECTS WATER RIGHTS SITUATED IN NEW MEXICO.

Appellants are charged with having violated a decree of the United States District Court for Arizona. The decree undertook to quiet title to appellants' water rights in New Mexico.

Appellants moved the court to vacate the decree in so far as it affects their water rights in New Mexico. (R. p. 188.)

The suit in which the decree was entered was brought to quiet title to water rights in the Gila River in Arizona and New Mexico, including the water rights of these appellants in the latter state.

By the amended complaint, jurisdiction was alleged to depend on the fact that the United States of America was a party. (R. p. 5.)

The defendants are some forty canal or ditch companies and irrigation districts and approximately fifteen hundred municipal corporations, school districts, corporations and persons, residents of Arizona and New Mexico. (Stipulation, R. p. 255.) It was alleged that the defendants claimed rights to divert water from the Gila River as it flows between a line ten miles east of the parallel to the dividing line between Arizona and New Mexico and the confluence of the Salt River with the Gila River in Arizona, excluding the valleys of the San Francisco, San Carlos, San Pedro, and Santa Cruz Rivers. (R. p. 23.) Of the valley of the Gila River so described, approximately ten miles lies in New Mexico and the remainder of approximately one hundred and ninety miles lies in Arizona.

Excerpts from the amended complaint set out in the record at pages 21 to 24, paragraphs 14 and 15, inclusive, clearly show the nature of the suit, and that it was an action to quiet title to water rights. The decree (Appendix p. i) recites that the parties have compromised their claims, as set forth in their pleadings, and this statement is reiterated in the stipulation for the entry of the consent decree. (Appendix—Stipulation.)

This was not a suit in tort to obtain an injunction restraining the defendants from diverting the waters

of the Gila River above plaintiff's lands to its prejudice, and therefore not within *United States v. Walker River Irrigation District* (9 Cir.), 104 Fed. (2d) 334; *Vineyard Land and Stock Company v. Twin Falls S. R. L. & W. Co.* (9 Cir.), 245 Fed. 9; or *Rickey Land and Cattle Company v. Miller and Lux,* 218 U. S. 258, 54 L. ed. 1032, 152 Fed. 11, 146 Fed. 574.

In *Miller and Lux v. Rickey, et al.* (C. C.), 146 Fed. 574-575, characterizing the suit in that case, the court said:

> "The general nature and character of this suit may be briefly stated as one in tort to obtain an injunction restraining the defendants from diverting the waters of Walker River above complainant's land to its prejudice."

An action to quiet title to a water right is a local suit and must be commenced and prosecuted in the courts of the state in which the water right is situated. This court, in *Rickey Land and Cattle Co. v. Miller and Lux,* 152 Fed. 11-14, 15, approved the decision of the Supreme Court of Utah in *Conant v. Deep Creek and Curlew Valley Irrigation Co.,* 66 Pac. 188, 189. The Supreme Court of Utah said (p. 189):

> "An action therefore to quiet the title and determine and establish the rights to divert and use water for such purposes is in the nature of an action to quiet title to real estate and must be commenced and prosecuted in the courts of the state in which it is situated. The courts in one state are without jurisdiction to hear and determine suits affecting the title to lands in another state." Citing cases.

And in that case the court also said:

> "The respondents contend that the appellants, having interpleaded in the Idaho case and participated in the trial thereof, are estopped by the force of that adjudication from questioning it. Jurisdiction of the subject matter of a suit cannot be conferred by consent, neither can the want of such jurisdiction be waived." Citing cases.

In the recent case of *Albion-Idaho Land Co. v. Naf Irrigation Co.,* 97 Fed. (2d) 439 (10th Cir.), the court said:

> "A suit to adjudicate water rights is a local action. The Hart decree undertook to adjudicate water rights beyond the jurisdiction of the court and was void on its face." Citing in support *Conant v. Deep Creek and Curlew Valley Irrigation Co.* and *Rickey L. & C. Co. v. Miller and Lux,* 152 Fed. 11, affirmed 218 U. S. 258, 54 L. ed. 1032.

II.

THE STATE OF NEW MEXICO IS AN INDISPENSABLE PARTY.

The appellants moved the court to vacate the decree and orders pursuant thereto in so far as they affect water rights in New Mexico for the reason that the State of New Mexico is an indispensable party. (R. pp. 188, 189, 190.)

It appears from the record that there were 2456 acres of water rights under the Sunset Canal in the Virden District in New Mexico whose rights were determined by the decree, and that of the present

owners of said water rights fifty per cent are not parties to this suit. (R. p. 184.) It also appears in Firth's petition that seventy-five persons were named as respondents who were defendants and owners of land and water rights described in the decree. (R. 47.) Of these but thirty-two, who are the appellants here, were found to have irrigated land under the Sunset Canal in 1939. (R. p. 145.)

The court was also apprised of the fact that the State of New Mexico had challenged the court's decree and order and had assumed control of the Gila River and the diversion and distribution of its waters in New Mexico.

> "The decree was of no force against Oregon or Oregon appropriators not parties to the suit. United States v. Oregon, 295 U. S. 1-12; 79 L. ed. 1267-1272; Priest v. Las Vegas, 232 U. S. 604; 58 L. ed. 751."
>
> *Washington v. Oregon,* 297 U. S. 517-528; 80 L. ed. 837, 843.

New Mexico has a paramount right in the waters of the Gila River in New Mexico.

In *New Jersey v. New York,* 283 U. S. 335, 342, 343; 74 L. ed. 1104-1106, the Supreme Court said:

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be

> permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be."

In *Arizona v. California,* 298 U. S. 558-572; 80 L. ed. 1331-1339, the court said:

> "Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could has no finality."

The rights asserted by the plaintiff in this cause are subordinate to and dependent upon the right of New Mexico to an equitable share of the waters of the Gila River.

New Mexico has asserted its right and challenges the jurisdiction of the District Court of Arizona. The decree lacks finality and any decree of the United States District Court of Arizona in this cause in the absence of New Mexico will lack finality so far as it affects water rights on the Gila River in New Mexico.

It appears from the record that if the decree is enforced the lands and property of not only the defendants but the owners of fifty per cent of the land and water rights who are strangers to the decree will be destroyed.

Not only is the State of New Mexico not a party, but a large part of the owners of land and water rights

affected by the decree are not parties to and are not bound by the decree.

The Supreme Court of the United States in the case of *Wyoming v. Colorado,* 259 U. S. 419, 468, 66 L. ed. 999-1015, said:

> "As respects Wyoming the welfare, prosperity, and happiness of the people of the large part of the Laramie Valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus the interests of the state are indissolubly linked with the rights of the appropriators."

The State of New Mexico is an indispensable party for the further reason that the acts necessary to enforce the decree so far as they affect New Mexico water rights must be done in New Mexico and require the assent of New Mexico. It now appears that New Mexico has not given her consent but has prevented the enforcement of the decree by taking over the administration of the waters of the Gila River and ousting the court's water commissioner from further control.

In *Rickey Land and Cattle Company v. Miller and Lux,* 218 U. S. 258-262, 54 L. ed. 1032-1038, the court said:

> "The alleged rights of Miller and Lux involve a relation between parcels of land that cannot be brought within the same jurisdiction. This relation depends as well upon the permission of the laws of Nevada as upon the compulsion of the laws of California. It is true that the acts necessary

> to enforce it must be done in California and require the assent of that State so far as this court does not decide that they may be demanded as a consequence of whatever right, if any, it may attribute to Nevada."

Commenting upon this decision, Mr. Wiel in Volume 1, *Water Rights of Western States* (3d ed.) page 364, said:

> "In the late case of Rickey etc. Co. v. Miller, in the supreme court of the United States, the decision upon a question of procedure below referred to was based upon the principle of Kansas v. Colorado, that riparian owners in California or appropriators in Nevada, upon the Walker River crossing the boundary, must deduce any right they may have from the law of their respective States; and the enforcement of either right beyond the boundary of its State must depend upon the concurrence of the other State. Unless the upper State (California) will voluntarily impose conditions upon its citizens in favor of users in the lower State (Nevada), the latter have no right in the matter other than to complain that the lower State as such (and not merely the plaintiff) is not receiving an equitable share of the benefit of the stream. This seems to make rights upon interstate streams a matter of interstate relation, reachable by creation of joint commissions between the States interested, to establish rules for such streams."

The State of New Mexico is an indispensable party for the further reason that it appears from the record at this time that New Mexico, in taking charge of

the Gila River and the Sunset Ditch, has prevented the enforcement of the court's decree and order.

The court cannot compel these appellants to perform any act necessary to carry out the decree and order of this court because appellants have no power or control over the State of New Mexico, its officers or agents, or any means of compelling them to permit the performance of the court's decree and order.

The case of *Kendig v. Dean,* 97 U. S. 423, 24 L. ed. 1061, is in point here, from which we quote as follows:

> "The appellant, who was complainant below, was a citizen of Tennessee where the suit was brought, and Dean, the defendant, was a citizen of Ohio. The controversy related to one hundred and eighty-four shares of the stock of the Memphis Gas-Light Company, which Company was not made a party to the suit. A demurrer to the bill was overruled; and the Court, after hearing on bill, answer, exhibits and depositions, dismissed the bill on the merits.
>
> "We are of opinion that the circuit court had no jurisdiction to try the case, because the gas-light company was an indispensable party to the relief sought in the bill, or to any relief which a court of equity could give.
>
> "'The substance of the bill is that plaintiff was the owner of the shares of the gas company stock, already mentioned, and that while he so owned and held the stock, and during the late civil war, the defendant 'Obtained possession of the books and control of the offices of the company, and being so in possession and control, wrongfully and fraudu-

lently procured and obtained to be made a transfer upon the books of the company to his own name as owner, and from the name of your orator, the said 184 shares of stock, and the issuance to him of a certificate of said stock, and the cancellation of the certificate of his stock belonging to and in the name of your orator.' It is further alleged that this was done without purchase from, or consideration given to, plaintiff, and without any lawful authority.

"The relief prayed is, 'That the said capital stock may be restored to your orator, and deemed to be of his property; and that all the right and title thereto may be divested out of said Dean, and vested in your orator; and that said Dean may be compelled to cause and authorize the transfer of said stock to be made on the books of the company to your orator, and may be enjoined from making or authorizing to be made a transfer of any of the stock to any other person; and that other suitable relief may be granted to your orator.' The original certificate of stock is in possession of plaintiff, as he declares in the bill, and is annexed to it as an exhibit.

"It also appears that the corporation, at the time the suit was brought, had a president, a board of directors and a secretary. This suit is not brought to recover the dividends received by Dean which ought rightfully to have been paid to plaintiff. No such relief is asked, and no averment that any dividends were declared or paid to Dean on that account. Nor is it brought to recover damages for the wrongful seizure of plaintiff's property and conversion of it to defendant's use.

"The relief appropriate to either of these grievances might have been sought in an action at law. It is not an action to obtain from Dean the specific certificate of stock, for that remains in plaintiff's possession.

"The gravamen of the charge is that Dean, while in possession of the books and control of the offices of the company, caused a transfer to be made on the books of the company to him of the shares of its stock owned by plaintiff, and the relief asked is the restoration of the stock on the books of the company to the name of plaintiff, and the future recognition by the company of his rights in the stock. And the court is asked to compel Dean to do this.

"Suppose that the court had rendered a decree in the exact language asked by plaintiff, and Dean should be attached for contempt in refusing to perform it. He could answer very truly that he was not the gas light company, and had no control of the books or of the officers of the company; that he had no means of compelling the company to make transfer of this or any other stock on its books; that it was a corporation governed by its own officers, and was not bound by the decree of the court, and would not perform it. The court would find itself in the position of having made a decree it could not enforce, of attempting to give a relief which was beyond its power, because the party whose action was necessary to that relief was not a party to the suit.

"On the other hand if the gas-light company had been a party to the suit, and plaintiff had sustained the allegation of his bill by proof, the relief would have been perfect. The company could have

> been compelled to restore plaintiff to the ownership of the stock on their books, and to treat him in future as one of their stockholders, and the decree would have bound both Dean and the company. As it is, the specific relief sought by plaintiff is not within the power of the court, nor, is any relief within the equity jurisdiction of the court which can arise out of the frame of the bill in the absence of the gas light company.
>
> "The rules which govern the circuit courts of the United States sitting in chancery, in cases like this, have been well defined in the cases of Shields v. Barrow, 17 How., 130, 15 L. ed. 158, and Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825."

The appellants and owners of water rights acquired by complying with the statutes of the State of New Mexico acquired only the usufruct of the waters of said stream. The basic title and the right to control and dispose of said water remained at all times in the State of New Mexico, subject to the right to use in New Mexico under its laws. The appellants could not by a deed or other conveyance without the consent and against the will of the State of New Mexico sell their water rights to users in Arizona. Nor can they by a consent decree do indirectly what they cannot do directly by conveyance. New Mexico's equitable portion of the waters of the Gila River still remains a natural resource of the State of New Mexico for the benefit of the public. What that equitable portion may be has never been determined by a court of competent jurisdiction.

III.

SUCCESSORS IN TITLE TO DEFENDANTS OWNING WATER RIGHTS IN NEW MEXICO ARE NOT BOUND BY THE DECREE.

It appears from the record that one-half of the water rights in New Mexico adjudicated by the decree are now owned by persons who were not parties to the decree. As to them the decree is a nullity.

The Supreme Court in *Rickey Land and Cattle Co. v. Miller & Lux,* 218 U. S. 258-262, 54 L. ed. 1032-1038, states:

> "To affect a purchaser with a suit against his vendor, it is said that at least the *res* must be within the territorial jurisdiction of the court in which the suit is brought. See Fall v. Eastin, 215 U. S. 1, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3."

In the last mentioned case, *Fall v. Eastin,* supra, the court said (215 U. S. 11):

> "But, however plausibly the contrary view may be sustained, we think that the doctrine that the court, not having jurisdiction of the *res,* cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established."

IV.

THE DECREE AND ORDER OF THE DISTRICT COURT OPERATE DIRECTLY ON THE RIVER AND CANALS IN NEW MEXICO.

The decree provides that a Water Commissioner shall be appointed by the court to carry out and en-

force the performance of the decree and the instructions and orders of the court, and that if any proper order or direction of the Water Commissioner made for the enforcement of the decree is disobeyed he is empowered to cut off the water from the ditch then being used by the person so disobeying, promptly reporting his action to the court; that the means for securing funds to pay the salary and expenses of the Water Commissioner shall be fixed by the court. (Appendix, pars. XII and XIII.)

By its order of December 9, 1935, the District Court ordered the Water Commissioner to collect from the party designated by the decree as the party entitled to divert under the terms of the decree 13¢ per annum for each acre for which a water right is given by the decree; and the Water Commissioner is ordered and directed to refuse the delivery of water from the Gila River to any party entitled to divert so long as such diverter remains in default in the payment of any of its share of the said 13¢ per acre. (R. p. 59.)

By the decree the rights to divert water from the Gila River are decreed to the various canal companies. The appellants were not decreed rights to divert. (Appendix, pars. V and VIII.)

The evidence shows that the Water Commissioner on January 1, 1939, locked the headgates and notified the Sunset Canal Company to pay the assessment and that until it paid, the water would remain cut off. (R. p. 204.)

All of these acts were done, and by the decree and order required to be done, in the State of New Mexico.

This court in *Vineyard Land and Stock Co. v. Twin Falls S. R. L. & W. Co.,* 245 Fed. 9, said:

> " 'It (the court) cannot by any decree which it may make in this suit, directly reach the dams, ditches and reservoirs belonging to the defendant located entirely within the State of California.' Miller & Lux v. Rickey (C. C.), 127 Fed. 573-575. In this expression of the law we concur."

In the case of *Wyoming v. Colorado,* 298 U. S. 573, 80 L. ed. 1339, which was an original suit by the State of Wyoming against the State of Colorado to enforce the decree of the United States Supreme Court in an earlier suit between them respecting their relative rights to divert water from the Laramie River, an interstate stream rising in Colorado and flowing into the State of Wyoming; and the court, having fixed in the former suit the amount of water which it found the State of Colorado was entitled to divert, and Wyoming having complained that Colorado had diverted more than she was entitled to, the court had under consideration the right of the State of Wyoming to install measuring devices on the stream in Colorado, and on this point the court said (298 U. S. 585):

> "In the bill it is complained that Colorado, although requested so to do, has refused to permit Wyoming to install measuring devices at the places of diversion for the purpose of ascertaining the amount of water being diverted in Colorado from the river and its tributaries, and there is a prayer for a decretal order permitting such installation. The evidence bearing on this matter hardly can be regarded as establishing the pro-

priety of such an order, and yet it tends to show a need for improving the means and methods of measuring the diversions, for keeping accurate and complete records thereof, and for according to the representatives of Wyoming full access to both the measuring devices and the records. Recognizing this need, Colorado in her brief assures us that through her officers she will accord to Wyoming's officers free access to the measuring devices and to the registering charts, records, and other available data, will co-operate freely with them in devising an appropriate plan for measuring the diversions, and will give full consideration to such suggestions as they may make respecting the improvement of the measuring equipment. In this situation the order which is asked would be inappropriate. While the problem of measuring and recording the diversions is a difficult one, we entertain the hope that the two States will by co-operative efforts accomplish a satisfactory solution of it. But we think Wyoming should have leave to apply to us for an appropriate order in the matter if the two States are unable to agree and it is found that there is real need for invoking action by us."

In that case the Supreme Court of the United States had full jurisdiction to appoint its water master to control the diversion of water in Colorado, but was loathe to do so as long as it was not shown that the two states could not agree upon the installation and operation of measuring devices although the same were necessary to the enforcement of the court's decree.

V.

THE COURT ERRED IN MAKING FINDING OF FACT NO. II (R. p. 131) THAT THE SUNSET DITCH COMPANY WAS A CORPORATION AT THE TIME THE COURT ACQUIRED JURISDICTION IN THIS CAUSE.

The court found:

> "II. That the Sunset Ditch Company was, in 1903, duly incorporated under the laws of the State of New Mexico; that thereafter said corporation took possession of and thereafter managed and operated the Sunset Canal; that at the time the court acquired jurisdiction in this cause, said corporation was doing business under the name of 'Sunset Canal Company' in the states of Arizona and New Mexico, and ever since has been, and now is, doing business under said name; that during all of said time, the officers, agents and representatives of said corporation have acted for said corporation by using the name 'Sunset Canal Company', and still continue so to do; that the Sunset Canal Company is identical with the corporation organized and incorporated in 1903, under the laws of the State of New Mexico under the name of Sunset Ditch Company, and is referred to as a party-defendant herein under both names."

The court made the following Conclusion of Law:

> "3. That at the time of the entry of the decree herein, on the 29th day of June, 1935, the Sunset Canal Company was, ever since has been, and now is, a corporation doing business in the States of Arizona and New Mexico and within the jurisdiction of this court."

The records of the New Mexico State Corporation Commission show that the Sunset Ditch Company was

dissolved June 14, 1921 (R. p. 219) by virtue of a statute which provides:

> "That all private corporations organized under the laws of the Territory of New Mexico which have refused or neglected to file the annual reports required by law in the office of the State Corporation Commission of New Mexico, be and the same are hereby declared to be dissolved, and the State Corporation Commission is hereby authorized and directed to strike the names of all such corporations from its index of live corporations." Chapter 185, Session Laws of 1921 of New Mexico.

The records also show that there has never been a corporation known as the Sunset Canal Company incorporated in the territory or state of New Mexico. (R. p. 219.)

In *Oklahoma Natural Gas Co. v. Oklahoma,* 273 U. S. 634, the court said:

> "There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person in its effect. (Citing cases.) It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation pro hac vice. But

> corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

The original complaint was filed October 3, 1925, four years after the Sunset Ditch Company had been dissolved. (R. p. 2.) If the Sunset Ditch Company was dead, it could not act either in its own name or in the name of the Sunset Canal Company.

The finding was not that the Sunset Canal Company acted as a corporation, or for itself, but that the Sunset Ditch Company assumed the name of "Sunset Canal Company" and carried on the business of the Sunset Ditch Company under the assumed name.

The court fined the Sunset Canal Company. The court did not fine the Sunset Ditch Company.

The Sunset Canal Company did not appeal. There was no such corporation; it could not appeal. The Sunset Ditch Company could not appeal either in its own name or the name of the Sunset Canal Company.

Neither the finding of fact nor the conclusion of law is supported by the evidence.

VI.

THE COURT ERRED IN OVERRULING THE MOTION OF PARLEY P. JONES, R. W. BROOKS AND RACHEL JENSEN TO QUASH PROCESS AND SERVICE UPON THEM IN NEW MEXICO.

The appellants, Parley P. Jones, R. W. Brooks and Rachel Jensen were served in New Mexico with the rule to show cause issued in this case. They were summoned as officers and directors of the Sunset Canal Company, and, appearing specially for the motion only, they moved the court to quash the rule to show cause and service upon them as such officers and directors. This motion was overruled. (R. p. 129.)

In *Robertson v. Railroad Labor Board,* 268 U. S. 619-622, 69 L. ed. 1119-1121, the court said:

> "Under the general provisions of law, a United States district court cannot issue process beyond the limits of the district (Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237; Ex parte Graham, 3 Wash. C. C. 456, Fed. Cas. No. 5,657); and a defendant in a civil suit can be subjected to its jurisdiction in personam only by service within the district (Toland v. Sprague, 12 Pet. 300, 330, 9 L. ed. 1093, 1105). Such was the general rule established by the Judiciary Act of September 24, 1789, Chap. 20, §11, 1 Stat. at L. 73, 79, Comp. Stat. §1033, in acordance with the practice at the common law. Picquet v. Swan, 5 Mason 35, 39 et seq., Fed. Cas. No. 11,134. And such has been the general rule ever since. Munter v. Weil Corset Co., 261 U. S. 276, 279, 67 L. ed. 652, 654, 43 Sup. Ct. Rep. 347. No distinction has been drawn between the case where the plaintiff is the government and where he is a private citizen."

VII.

THE COURT ERRED IN REFUSING TO PERMIT APPELLANTS TO PROVE THAT THE WATER DIVERTED FROM THE GILA RIVER, ALLEGED TO HAVE BEEN DIVERTED IN VIOLATION OF THE DECREE AND ORDER OF THE COURT, WOULD NOT, IF IT HAD NOT BEEN DIVERTED, HAVE BENEFITED ANY WATER USER IN THE STATE OF ARIZONA.

The appellants offered to prove that in the year 1939 the water diverted by the State Engineer and used by the appellants and other water users in the State of New Mexico on the Gila River, and which was placed to beneficial use by them would not and could not have benefited any water users in Arizona, and that had the decree been enforced as interpreted by Mr. Firth, the water master, and as operated by him in former years, the result would have been that all crops and fruit trees of the appellants and other water users under the Gila River would have been destroyed. (R. pp. 171-174.)

In *Albion-Idaho Land Company v. Naf Irrigation Company,* 97 Fed. (2d) 439-444 (10 Cir.), the court said:

> "(11) While ordinarily a prior appropriator has a paramount right to divert water from the stream and a junior appropriator may not divert water unless the waters flowing in the stream are in excess of the amount which the prior appropriator has the right to divert, if, due to seepage, evaporation, and channel absorption or other physical conditions beyond the control of the appropriators, the water flowing in the stream will not reach the diversion point of the prior appropriator in sufficient quantity for him to

apply it to beneficial use, then a junior appropriator whose diversion point is higher on the stream may divert the water. The paramount right of the prior appropriator does not justify him in insisting that the water be wasted and lost by denying its use to the junior appropriator under such circumstances."

Fenstermaker v. Jorgensen, 53 Utah 325, 178 P. 760, 763;

Cleary v. Daniels, 50 Utah 494, 167 P. 820, 833;

Dern v. Tanner (D. C. Mont.), 60 F. (2d) 626, 628;

Washington v. Oregon, 297 U. S. 517, 522, 523, 56 S. Ct. 540, 542, 80 L. ed. 837.

VIII.

THE COURT ERRED IN REFUSING TO PERMIT APPELLANTS TO PROVE THAT THE COURT'S ORDER AND DECREE WERE PHYSICALLY IMPOSSIBLE OF ENFORCEMENT IN NEW MEXICO BECAUSE ONE-HALF OF THE WATER RIGHTS ADJUDICATED BY SAID DECREE ARE NOW OWNED AND OPERATED BY PERSONS WHO ARE NOT PARTIES TO THIS SUIT. (R. pp. 175-176.)

The appellants offered to prove that one-half of the lands and water rights in New Mexico on the Gila River which were described in and title to which was attempted to be adjudicated in this suit have passed into the hands of innocent purchasers who are not now and never have been parties to this decree, and that such lands are all served by one canal which also serves the lands of these appellants, and that it is impossible to divert and distribute the water

of the Gila River through the Sunset Canal to the appellants in compliance with the decree and orders of the court and at the same time permit the persons who are not parties to this suit free access to the waters of the river and the right to divert and use the same according to their New Mexico appropriations, and that when in January, 1939, Mr. Firth cut off the waters of the Gila River from the Sunset Canal and notified the officers of the Sunset Canal Company that the same would not be turned on or diverted until the acreage assessment had been paid, he not only deprived the appellants of water, but also the other water users under the Sunset Canal of water to which they were entitled.

If the decree does not affect title to lands and water rights in New Mexico and is effective only in so far as the court had jurisdiction of the defendants and these appellants, it then follows that the purchasers from defendants are not bound by the decree. The decree as to them in New Mexico until and unless the court acquires jurisdiction over their persons and coerces their obedience to the decree and orders of the court is unenforceable. They are not bound as purchasers of land are bound by actual notice of an outstanding deed or other evidence of title because the decree is not effective as a conveyance or a grant, nor is the decree constructive notice for the same reason.

IX.

THE COURT ERRED IN RULING THAT THE BURDEN OF PROOF WAS UPON THE APPELLANTS TO PROVE THAT THEY WERE NOT GUILTY OF THE CHARGES OF CONTEMPT MADE AGAINST THEM.

The court at the opening of the case at the hearing upon the motion of the District Attorney ruled that the burden was upon the appellants to prove that they were not guilty of contempt, to which ruling an exception was taken. (R. p. 169.)

This court in *Hanley v. Pacific Live Stock Co.,* 234 Fed. 522, 531, said:

> "Although it has not been held by the Supreme Court that in a procedure of a civil nature such as the one here before us, the defendant is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt (Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (NS) 874), the trend of all the decisions is that the evidence of contempt must be convincing. In California Paving Co. v. Molitor, 113 U. S. 609, 618, 5 Sup. Ct. 618, 622 (28 L. ed. 1106), Mr. Justice Bradley said:
>
> " 'Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct.'
>
> "In Accumulator Co. v. Consolidated Electric Storage Co. (CC), 53 Fed. 793, in a proceeding for contempt for violation of an injunction, the court said:
>
> " 'This proceeding is criminal in its nature and character, and the same rules should govern as

in the trial of indictments. The burden of proof of establishing violation of the injunction is upon the complainant, and the defendants are entitled to the benefit of any reasonable doubt.'

"So in General Electric Co. v. McLaren (CC), 140 Fed. 876, the court held that the burden of proof to establish the violation of an injunction rests upon the complainant, and that the defendant is entitled to the benefit of every reasonable doubt."

Also, see:

17 C. J. S. "Contempt", p. 114—note:

"Heavy Burden Rests on Plaintiff

"(1) 'The plaintiffs must establish the law and the facts relied on to make out the alleged contempt; but, as this is a proceeding to have the defendant adjudged guilty of a civil contempt, I am not prepared to say that the plaintiffs must establish their case beyond all reasonable doubt * * * But the burden is heavy on the plaintiffs, and where there is reasonable ground to doubt as to the wrongfulness of the conduct of the defendant, it should not be adjudged in contempt.' Electro-Bleaching Gas Co. v. Paradon Engineering Co., D. C. N. Y., 15 Fed. (2d) 854, 855.

"(2) 'The plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by "clear and convincing evidence", and where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.' Fox v. Capital Co., C. C. A. J. N., 96 F. (2d) 684, 686."

X.

APPELLANTS ARE NOT GUILTY OF DISOBEDIENCE OR RESISTANCE TO ANY LAWFUL WRIT, PROCESS, ORDER, RULE, DECREE OR COMMAND OF THE COURT.

The offense charged against these appellants is that they refused or failed to pay the Water Commissioner 13¢ per acre for the land owned by them, to which a water right had been decreed, and used water from the Gila River without paying the said assessment.

During the hearing the following statements were made by the court and by the United States District Attorney:

> "The Court. If I understand the government's position here, the offense was failing to make their payments on the assessments?
>
> "Mr. Flynn. Yes, your honor." (R. p. 251.)

The court later stated that he would make a finding (Court's Finding of Fact No. 15-A, R. p. 141) that the appellants broke or caused to be broken the locks on the headgates of the Sunset Canal (R. p. 251), but as there is no evidence to support this finding we will not notice it further except to call the court's attention to the fact that the locks and measuring devices were replaced by those installed by the State Engineer of New Mexico (R. p. 54), and there was no complaint that the measuring devices so installed were not efficient or that Firth was denied access thereto.

It is also to be observed that there was no charge that appellants by their use of water deprived any lower appropriator of water which the latter could have beneficially used. This would seem to dispose of

any question of a violation of the injunction granted in the consent decree.

Mr. Wiel, with reference to the effect of an injunction in a like situation, made the following comment:

> "The modern rule is to regard injunctions granted to appropriators as based strictly upon beneficial use and as not restraining a defendant while the plaintiff is not himself using the water, even if the decree does not (as it should) expressly so declare; * * *" Citing cases. 1 Wiel, Water Rights in the Western States, p. 708.

The sound reason behind this rule is stated by this court in *United States v. Walker River Irrigation District* (9 Cir.), 104 Fed. (2d) 334-340:

> "So precious is every miner's inch of water in these parched regions that no arrangement should be countenanced which would encourage waste or tend to induce it."

That the appellants made use of the water to save their crops is not questioned. It is not shown that any lower appropriator within the protection of the injunction could have applied the water to beneficial use.

This proceeding was instituted for the sole purpose of vindicating petitioner Firth's right to collect 13¢ per acre from appellants.

Neither the decree nor the order fixing the acreage assessment makes it the duty of the appellants to pay Firth 13¢ per acre. That part of the order providing

for the payment of the acreage assessment reads as follows:

> "It Is Further Ordered that all expenses of the Water Commissioner herein authorized shall be paid by the land owners and for that purpose the Water Commissioner is authorized and directed to collect 13¢ for each acre of land for which a water right is given in the decree. The Water Commissioner is further directed to collect said 13¢ per acre from each individual, corporation, or party designated in the decree as the party entitled to divert water from the Gila River under the terms thereof * * *"

Nowhere in the order were the appellants commanded to pay Firth 13¢ per acre. That this was Firth's interpretation of the order is evidence by the fact that he made no demand on appellants to pay the assessment but did make a demand on the Sunset Canal Company. (Finding No. XIV, R. pp. 140, 204.)

The order directed Water Commissioner "to collect said 13¢ per acre from each individual, corporation or party entitled to divert water from the Gila River under the term of" the decree. (R. p. 135.) The appellants were not entitled to divert water from the Gila River under the terms of the decree. The Sunset Canal Company was.

It was further provided by the order that "the Water Commissioner is ordered and directed to refuse delivery of water from the Gila River to any party entitled to divert so long as such diverter re-

mains in default in the payment of any of its share of the said 13 cents per acre". (R. p. 136.)

There was no express order commanding appellants to pay the 13 cents per acre assessment nor to refrain from using the water of the river as long as the assessment remained unpaid.

We call the court's attention to the following authorities:

In the case of *In re Probst* (2d Cir.), 205 Fed. 512-513, the court said:

> "Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. * * * This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

The same court in *Berry v. Midtown* (2d Cir.), 104 Fed. (2d) 107-111, said:

> "Before a person should be subject to punishment for violating a command of the court, the order should inform him in definite terms as to the duties thereby imposed upon him. Once we adopt the principle that an express order to one party carries implications of duties imposed upon the other, it would be difficult to set limits upon the doctrine. We believe it is a wiser policy to punish as contempt only the disobedience of some express command; and such we understand to be the general rule."

Quoting from *Probst* case, supra, the court in *Morgan v. United States* (8th Cir.), 95 Fed. (2d) 830-836, said:

> "That we are in accord with the quoted declaration of the court, as to our duty to pay scrupulous attention to the limitation imposed by Congress upon the power of the court to punish for contempt, appears from the following expression of this court in Wilson v. United States, 8 Cir. 25 F. (2d) 215, 218: 'Section 385 is a limitation on the power of the inferior federal courts to punish for contempt, Ex parte Robinson, 19 Wall. 505, 22 L. ed. 205; and the power must be exercised within the restrictions therein named'."

If this court should be of the opinion that the order laid an express command upon appellants to pay Firth 13 cents per acre or until the assessments were paid, they were enjoined from using water and that appellants have violated said order or orders then we respectfully submit that the court was without jurisdiction to levy the assessments.

If the court had no power to control the canal, its headgates and measuring devices, through the agency of its Water Commissioner, then it follows that the court could not require appellants to pay Firth for his services in acting as the court's officer or agent for that purpose.

In *Vineyard Land and Stock Company v. Twin Falls S. R. L. & W. Co.,* 245 Fed. 9-29, this court said:

> "(16) It is furthermore necessary, to protect the plaintiffs against the encroachments of de-

fendant, that the water be measured. The proper measurement is a duty personal to the defendant. It was altogether appropriate, therefore, that the court impose upon the defendant the obligation of installing automatic measuring devices, and, for the protection of the plaintiffs, these should be subject to their inspection. So it is respecting rules regulating the manner of diverting, measuring, and distributing the water and the keeping of records of the amount of water diverted, etc. These were all directions of the court operating in personam, and not directly upon the res, and were and are within the court's equitable jurisdiction to determine and declare."

XI.

THE FINE IMPOSED OF $100.00 EACH ON THE APPELLANTS IS FOR A ROUND SUM OF MONEY, NOT BASED UPON ANY PROVED ITEM OR ITEMS OF EXPENSE, BUT INTENDED TO COVER IN PART PROBABLE LOSSES AND EXPENSE, AND IS ARBITRARY, ARRIVED AT BY CONJECTURE, AND THAT SAID FINE IS PUNITIVE AND NOT REMEDIAL.

The court having announced his judgment (R. p. 245) that he proposed to fine the appellants $100.00 each, and before the entry of the judgment (R. p. 245) counsel for appellants objected for the reason that the said fine is for a round sum of money, not based upon any proved items of loss or expense and intended to cover probable losses and expenses, and that it is not confined to the actual loss to the petitioner incurred by violation of the injunction, including the expenses of the proceedings necessitated by

presenting the offense to the court, but that said sum is arbitrary and arrived at by conjecture.

Appellants rely upon *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (2 Cir.), 135 Fed. 774-782, in which the court said:

> "It will thus be seen that the practice has not been uniform, and that in some of the adjudged cases the award, like that in the present case, was for a round sum, not based upon any proved items of loss or expense, but apparently intended to cover probable loss and expenses. It is obvious that a fine exceeding the indemnity to which the complainant is entitled is purely punitive, and, notwithstanding the foregoing precedents to the contrary, we think that when it is imposed by way of indemnity to the aggrieved party it should not exceed his actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. We are also of the opinion that when the fine is not limited to the taxable costs it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture, and in this sense it would be merely an arbitrary decision. Another reason why it should be based upon evidence is that otherwise the question of its reasonableness cannot be re-examined upon an appeal from a final decree in the cause, and the appellate court would have to treat the fine as a purely arbitrary one, or deny to the appellant his right of review.

> "The orders under review did not proceed upon any estimate of the actual loss or expenses which the complainant had incurred made from the evidence before the court, and for this reason we think they were erroneous. It may be that the sum directed to be paid to the complainant in the first proceeding was not excessive in amount, but whether it was or was not, and how much of it was intended to cover the expenses of the proceeding, and how much the loss directly suffered by the violation of the injunction, can only be conjectured."

Quoted with approval in *Norstrom v. Wahl* (6 Cir.), 41 Fed. (2d) 910-913. Followed in *Catalin Corporation of America v. Slosse,* D. C. N. Y., 31 Fed. Supp. 89 (1940).

In view of the present state of the record and the fact that the government of the United States is an interested party here, we do not believe that the court will assume that the petitioner Firth has paid or obligated himself to pay attorneys' fees.

XII.

IF FAILURE TO PAY THE THIRTEEN CENTS PER ACRE CONSTITUTES CONTEMPT, THE ONLY RELIEF THE TRIAL COURT COULD HAVE GRANTED THE PETITIONER WAS TO IMPRISON THE RESPONDENTS UNTIL THEY HAD PAID SAID THIRTEEN CENTS PER ACRE.

The court held that the charge against appellants was their failure to pay the assessments. (R. p. 251.)

This was a refusal to do an affirmative act required by the court's decree and ordered to be done by them.

This was not an act done in disobedience of the court's decree or order. They are charged with having refused to do that which they were commanded to do.

In *Gompers v. Buck's Stove and Range Co.*, 221 U. S. 418, 452, 55 L. ed. 797-810, the court said:

> "The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment.
>
> "In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by the act of disobedience."

And the court said in the same case (221 U. S. 442, 55 L. ed. 806):

> "But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do

what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."

CONCLUSION.

The judgment should be reversed with instructions to the lower court to set aside its judgment and either vacate the consent decree as to these appellants or dismiss the petition in the contempt proceedings.

Dated, Albuquerque, New Mexico,
August 12, 1940.

Respectfully submitted,
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Of Counsel.

(Appendix Follows.)

Appendix.

DECREE.

This cause came on to be heard at this term, and thereupon it was shown to the court:

That the plaintiff and the parties defendant whose claims and rights have been presented by answer or stipulation and remain for determination herein, have concluded and settled all issues in this cause as between plaintiff and said parties defendant, and as between said defendants and each of them and every other thereof, and mutually have agreed—all as evidenced, for plaintiff, by the assenting signatures, endorsed at the end hereof, of its solicitors of record and the Attorney General and Secretary of the Interior of the United States, and for said defendants, by the assenting signatures, likewise endorsed at the end hereof personally, or of their several solicitors of record—that such settlement should be embodied in and confirmed and made effective by way of the within decree of the Court in this cause, defining and adjudicating their claims and rights as against each other in identical form and substance as hereinafter set forth; and the Court upon consideration thereof and of the record herein as to the disposal of the parties defendant who have been separated from the cause, and being duly informed in said premises, doth find, order, adjudge, and declare its decree herein to be as follows, namely: * * *

V.

* * * that rights to divert the waters of the Gila River are decreed to the various canal companies and are set down under their names in the Priority Schedule as of various dates of priority; that the description in each instance of the lands through the irrigation of which said rights were acquired by appropriation and beneficial use and the names of the landowners or their successors in interest, made formal parties defendant herein (and set down under the heading "PARTIES OWNING SAID LANDS WHEN JURISDICTION ACQUIRED HEREIN"), whose beneficial application of water to said lands supported said appropriations are also listed under the names of each of said canal companies, the amounts of water in acre feet per season, with the maximum rates of diversion, allowed for the irrigation of the various subdivisions of said lands being given in the so-called individual columns under the general heading "Diversion Right" in said Priority Schedule; all to the end that the diversion rights of said canal companies may be adequately defined, and the individual rights of said defendant landowners to maintain, arrange or contract for, under applicable statutes and provisions of law, the diversion and carriage of water from the stream to said lands under and in accord with said rights may be identified and preserved; that the irrigation season referred to in this Article of the Decree, which shall as well apply to all rights adjudicated herein, is hereby defined as and determined to be the period beginning on January 1st of each year and

ending on December 31st of the same year; that the Schedule above referred to and made part hereof is as follows:

* * * * * * *

VIII.

That the diversions of water from the Gila River by the so-called upper valleys defendants (parties defendant to whom rights to divert water from the Gila River at points above the San Carlos Reservoir are decreed herein), comprising the defendant canal companies named below, with the parties defendant named in the Priority Schedule and attached tables who are decreed rights through the canals of said companies and are served thereunder, and certain individual parties defendant who are accredited with rights to divert directly from the stream through private ditches, to-wit:

Albert Canal Company, Billingsley Extension Canal Company, Black & McCleskey Canal Company, Brown Canal Company, Colmenero Canal Company, Colvin-Jones Canal Company, Cosper & Windham Canal Company, Cosper & Windham Extention Canal Company (Under contract whereby Cosper & Windham Canal Company makes actual diversion), Curtis Canal Company, Dodge-Nevada Canal Company, Duncan Canal Company, Fort Thomas Consolidated Canal Company, Fourness Canal Company, Graham Canal Company, Moddle Canal Company, Montezuma Canal Company, San Jose Canal Company, Sexton Canal Company, Shriver Ditch Company, Smithville Canal Company, Sunflower Canal Company, Sunset Canal

Company, Tidwell Canal Company, Union Canal Company, Valley Canal Company, York Canal Company, York Cattle Company;

R. H. Angle, J. H. Brown, T. D. Burton, W. C. Craufurd, J. W. Foote, R. C. Gilleland, J. H. Henderson, C. C. Hester, F. E. Ross, R. Sexton, Laura Short;
* * *

XII.

That a Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this decree, and the instructions and orders of the Court, and if any proper orders, rules or directions of such Water Commissioner, made in accordance with and for the enforcement of this decree, are disobeyed or disregarded he is hereby empowered and authorized to cut off the water from the ditch then being used by the person so disobeying or disregarding such proper orders, rules or directions; promptly reporting to the Court his said action in such case and the circumstances connected therewith and leading thereto; that whenever the necessities of the situation appear to the Court so to require, the Court shall authorize the employment by the Water Commissioner of such person or persons to assist that officer as to the Court may seem necessary to carry out properly the provisions of this decree and the orders of the Court; that the term of employment, expenses and compensation of said Water Commissioner and his assistants, the payment thereof and the means and methods for securing funds with which to pay the same, shall be fixed by orders which the Court may hereafter from time to

time make; that any person, feeling aggrieved by any action or order of the Water Commissioner, in writing and under oath, may complain to the Court, after service of a copy of such complaint on the Water Commissioner, and the Court shall promptly review such action or order and make such order as may be proper in the premises; that the owner or owners of each ditch or canal herein authorized to divert water from the natural flow of the Gila River for direct conveyance to and irrigation of lands, unless specifically excused by the Court or Water Commissioner, shall at his own expense install and at all times maintain at any appropriate place at or near the head of said ditch, a reliable and readily operated regulating headgate and a measuring box, flume or other device which may be locked and set in position—the same to be approved by the Water Commissioner—so that the water diverted into said ditch or canal at any and all times may be regulated and measured; that upon failure of any owner or owners to install structures of the above described character on or before one year from the date of this decree or on or before such different day as the Court or Water Commissioner shall set or determine—after due notice from the Water Commissioner so to do—the said Water Commissioner is herein authorized to cut off diversions of water into said ditch or canal until such devices and structures shall be installed and maintained.

XIII.

That each and all of the parties to whom rights to water are decreed in this cause (and the persons,

estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters of the Gila River or any part thereof, so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree; that nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest, under any transfer or legal succession in interest after the commencement of this action, to any of the rights hereby adjudicated; that except as hereinbefore mentioned or otherwise stated, the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and parties hereto, whether substituted as parties or appearing in this case or named herein or not; that the

several parties to this suit shall pay their own costs in this action as directly incurred or authorized by them respectively, provided that any compensation of the Water Commissioner, or amounts shown to be coming to him or the reporter, if any there be, shall be paid in such manner, at such times and by such parties as may be ordered by the Court; that the Court retains jurisdiction hereof for the limited purpose above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Done in Open Court this twenty-ninth day of June, 1935.

Albert M. Sames,
Judge.

STIPULATION FOR AND CONSENT TO THE ENTRY OF A FINAL DECREE IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA IN THE CASE OF UNITED STATES OF AMERICA, v. GILA VALLEY IRRIGATION DISTRICT, ET AL.

Come now the parties hereto, either in person or by their solicitors, and inform the Court that they have reached a settlement of the issues in this cause and have adjusted and settled their respective claims as between each other; that they have set up in the within and foregoing decree the respective rights of all parties hereto, and request the Court to adopt said decree as its finding herein and that it be entered as its final decree in this cause, settling and adjudicating the rights of the parties hereto. * * *